Supreme Court, U.S.
FILED
SEP 2 1999
OFFICE OF THE CLERK

(3)

No. 98-2023

In the Supreme Court of the United States

ALABAMA MUNICIPAL INSURANCE CORPORATION, ET AL.,

Petitioners,

v.

STATE OF ALABAMA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR THE PETITIONERS

RICHARD A. BALL, JR.
FRED B. MATTHEWS
Ball, Ball, Matthews & Novak, P.A.
Post Office Box 2148
Montgomery, AL 36102
(334) 387-7680

KENNETH S. GELLER
Counsel of Record
CHARLES ROTHFELD
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

10 pp

TABLE OF AUTHORITIES

Cases: **Page(s)**

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 6

Nordlinger v. Hahn, 505 U.S. 1 (1992).....4,5

Romer v. Evans, 517 U.S. 620 (1996).....2,4,5

South Dakota v. American Bankers Insurance Co., 374 N.W.2d 609 (1985).....4,5

Zobel v. Williams, 457 U.S. 55 (1982).....3,4

REPLY BRIEF FOR THE PETITIONERS

The State's response to the petition for certiorari helps to focus the important issues presented by this case. *First*, the State cannot deny that the system of tax credits challenged here was designed to benefit a single company (Alfa Mutual Insurance Company) and to disadvantage that company's competitors.[1] *Second*, despite some hemming and hawing, the State cannot deny that the credits, while providing significant benefits to that single company, are of no substantial value to most of the more than 600 other insurance companies doing property and casualty business in Alabama. See Pet. 4.[2] And *third*, it

---

[1] The State's only response to this point is the halfhearted complaint that "petitioners' theory that one company convinced the Alabama Legislature to grant it favored status requires a highly speculative view of the record." Br. in Opp. 21. But there is nothing speculative about the undisputed facts that the challenged credits were drawn in light of the number of offices and employees that Alfa had in Alabama; that the Real Property Investment Credit was modified at Alfa's request in a manner that restricted the number of companies that may take the full credit but had *no* effect on Alfa's ability to take the credit; and that Alfa is now the *only* company in the State that is able to take full advantage of both credits. See Pet. 4-5. The State takes issue with none of this.

[2] The State tries to obscure this reality, contending at various points that certain of the petitioners benefit from tax credits *other* than the ones at issue here (Br. in Opp. 5) and that "petitioners fail to mention the benefits they received from the[] [challenged] provisions." *Id.* at 6. Actually, the petition *does* mention the benefits that petitioners receive from the challenged credits (perhaps the State overlooked the reference because the amounts of the benefits are so small). See Pet. 4 n.4. For its part, the State fails to mention the trial court's factual finding that *none* of the petitioners "realized a substantial benefit from the credits" (Pet. App. 18a); that conclusion was not disturbed by the Alabama

(continued...)

accordingly is clear that Alabama has enacted a perverse regime that generally gives bigger tax credits to large than to small businesses and that, in particular, gives a substantial tax benefit to a single large company while disadvantaging that company's smaller competitors.

Against this background, the State's principal argument against certiorari is that the deferential nature of rational-basis equal protection review has long been settled and that all there is to do in this case is apply established principles to Alabama's peculiar statute. Br. in Opp. 6-11. But that is no answer at all to the questions posed in the petition. By the State's reasoning, review by this Court *never* is appropriate in equal protection cases. As we note in the petition (at 9-10 & n.7), however, the Court has reviewed — and reversed — lower court decisions rejecting rational-basis equal protection challenges with some frequency. It should do so again in this case: the Alabama Supreme Court's decision, while reciting the asserted rationales for the State's statute, makes no meaningful inquiry into whether the challenged credits possibly could advance the ostensible statutory purposes. This approach wholly eliminates "[t]he search for the link between classification and objective [that] gives substance to the Equal Protection Clause." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996). Further review therefore is in order.

---

[2] (...continued)
Supreme Court. The State also asserts that the Alabama scheme is "more nuanced" than we suggest, hypothesizing circumstances in which the "10% property-to-asset limit does not apply." Br. in Opp. 20. Again, however, this assertion (which was not the basis for the ruling below) is belied by the trial court's undisturbed finding that "[a] company with less than one hundred million dollars in assets is effectively prohibited from investing as much as ten million dollars in real estate by § 27-41-34 *Code of Alabama*, 1975." Pet. App. 18a.

1. Although They Purport To Encourage Future Behavior, The Credits In Fact Reward Past Conduct

In addressing the specific arguments against the constitutionality of the credits advanced in the petition, the State begins by contending that the decision in *Zobel* v. *Williams*, 457 U.S. 55 (1982), is inapposite here because the credits' "incentives for future economic activities are based on alterable economic conditions, not matters frozen in the past." Br. in Opp. 12. But this assertion simply blinks reality. It is essentially undisputed that the credits were structured to benefit a particular company in light of that company's investment and employment structure *at the time of the credits' enactment*. In this light, the State's asserted rationale for the Office Facilities Credit — that it will "encourage competition among insurers in rural areas of the state" by "encourag[ing]" "insurers * * * to open more offices in the state, some of which presumably will be in areas not already dominated by their competitors, i.e., in rural areas" (Pet. App. 11a) — is simply nonsensical as applied to a company that *already* has enough facilities to qualify for the maximum credit.[3]

At the same time, the State's argument (at Br. in Opp. 13) that the credits may be justified on the ground that they encourage economic activity because they "incrementally reward[] insurers" for *continuing* the employment of workers and the operation of offices is unpersuasive. The credits make it impossible for new entrants — who really might provide more competition and employment — ever to compete on even terms with Alfa, meaning that the State's regime makes those new entrants "more likely to become dissatisfied and to *leave* the State." *Zobel*, 457 U.S. at 62 n.9 (emphasis added). As we note in the petition (at 13), "it would thus seem that the State would give a larger, rather than a smaller, [credit] to new [insurers] if

---

[3] In addition, the statute contains no requirement that any office be located in a rural area.

it wanted to" encourage employment and competition. *Zobel*, 457 U.S. at 62 n.9. The State has no response to this point.

2. *The State's Justification For The Real Property Investment Credit Is Pretextual*

We also explain in the petition that the State's rationale for the Real Property Investment Credit is pretextual because the State claims that the credit is designed to encourage an activity (investment in real estate) that other aspects of state law either limit or wholly *preclude* so far as most insurance companies are concerned. Pet. 15-22. The State's response to this point is directed at a caricature of our position. We do not contend, as the State would have it, that a "state commits a constitutional violation whenever it enacts a statute that embodies a policy inconsistent with that contained in a separate, independent statute." Br. in Opp. 16. Instead, our argument is the common-sensical one that, because state law limits or bars most insurance companies from investing in real estate, it is "impossible to credit" the State's assertion that the credit is intended to encourage investment by insurance companies in *that very same real estate* (*Romer*, 517 U.S. at 635); the case presents a situation "where the facts preclude[] any plausible inference that the reason for the unequal [treatment]" is the one asserted by the State. *Nordlinger* v. *Hahn*, 505 U.S. 1, 15 (1992). Instead, it seems plain that the credits were designed to be what they manifestly are: a discriminatory regime that benefits a particular company while disadvantaging its competitors.

That was precisely the analysis used in *South Dakota* v. *American Bankers Ins. Co.*, 374 N.W.2d 609 (S.D. 1985), which held that inconsistency between the stated goal of a tax statute that discriminated against certain out-of-state insurers and other elements of South Dakota law belied South Dakota's defense of its tax regime. The State here argues that *American Bankers* is inapposite because that case was decided on the ground that a tax intended to burden out-of-state corporations does not serve a legitimate purpose, a holding that has no bearing here. Br. in

Opp. 19. But the State disregards the relevant portion of the *American Bankers* analysis. Responding to South Dakota's argument that a discriminatory tax on foreign insurers that were not licensed to do business in the State could be justified on the ground that the levy encouraged foreign insurers to get a license, the South Dakota Supreme Court explained that other provisions of state law *exempted* the foreign insurers from the requirement that they obtain a license. 374 N.W.2d at 617. The court accordingly struck down the discriminatory tax because:

> the very class of foreign insurers which the legislature has exempted from the state's regulatory requirement is the same class of foreign insurers singled out for a higher tax burden because they have not obtained a certificate of authority. The discriminatory premium tax penalizes the very conduct seemingly promoted under [the exemption]. It is apparent, therefore, that the stated purposes for the imposition of a higher tax on unlicensed foreign insurers are pretextual.

Ibid. The trial court in this case used the same analysis, noting that the inconsistency between Alabama's solvency requirements and the Real Estate Investment Credit meant that the asserted rationale for the credit "could be considered pretextual." Pet. App. 21a. The Alabama Supreme Court's rejection of that approach cannot be reconciled with *American Bankers*.

3. The Challenged Credits Draw A Distinction For Its "Own Sake"

In addition, we argue in the petition that the discriminatory tax credits impermissibly draw a distinction for its "own sake." *Romer*, 517 U.S. at 635. See Pet. 22-24. The State's response to this point is, again, directed at a straw man. We do not contend that courts are obligated to conduct trials "to determine which interest group was responsible for passage of legislation." Br. in Opp. 22. But where the State's asserted justification for its classification is pretextual — and where State power is used

for the naked purpose of benefitting one entity and disadvantaging others who are identically situated — "the disparate treatment accorded the affected classes is arbitrary." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 441 (1982) (opinion of Blackmun, J.). That is the situation here.

4. Review Is Warranted Because The Alabama Supreme Court Erroneously Applied The "Beyond A Reasonable Doubt" Standard

Finally, we argue in the petition (at 24-27) that the Alabama Supreme Court committed a fundamental error by applying the "beyond a reasonable doubt" standard to the equal protection challenge in this case, and that other state courts of last resort have used a similar erroneous analysis. In response, the State makes no attempt to defend the applicability of such a standard in equal protection cases, and it does not deny that use of the standard would raise serious constitutional questions warranting this Court's attention. Instead, the State simply asserts that the Alabama Supreme Court (and the other courts cited in the petition) did not mean what they plainly said when they described "beyond a reasonable doubt" as the controlling standard. In the State's view, the Alabama court applied the "beyond a reasonable doubt" test in resolving the *state* constitutional challenge, but not in its analysis of the *federal* Equal Protection Clause claim. Br. in Opp. 23-24. In fact, however, the court below expressly applied that test to both claims, upholding the challenged credits because "it is not clear beyond a reasonable doubt that the tax credits at issue violate *either* the Alabama Constitution *or the Federal Constitution*." Pet. App. 8a-9a (emphasis added). Given the virtually insuperable burden placed on equal protection plaintiffs by the Alabama court, there is no reason to doubt that it applied that standard.[4]

---

[4] Curiously, the State *acknowledges* that the Alabama Supreme Court "consciously applied its long-standing 'beyond a reasonable

(continued...)

Perhaps recognizing the weakness of its contention on the merits, the State also asserts that review on this issue is not warranted because petitioners did not raise the point below. Br. in Opp. 23. But this contention is sophistic: petitioners did not object below to application of the "beyond a reasonable doubt" standard because they had neither the reason nor an opportunity to do so. The State did not contend in its arguments to the courts below that such a standard applied, and the trial court did not in fact apply it. The issue arose for the first time when the Alabama Supreme Court issued its decision actually applying the "beyond a reasonable doubt" standard. Petitioners therefore raised the issue at their earliest opportunity.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

---

[4] (...continued)
doubt' standard governing tax challenges under the Alabama Constitution." Br. in Opp. 24. The State nevertheless insists that the court conducted its federal and state constitutional inquiries separately, confining its "beyond a reasonable doubt" analysis to its consideration of the *state* constitution. See *ibid.* But this creative distinction does not hold up to scrutiny. The court's only invocation of the "beyond a reasonable doubt" standard expressly applied it to both the federal and the state constitutional challenges. The court's subsequent, separate discussion of the state-law challenge did not again advert to the standard of proof (see Pet. App. 9a-10a); indeed, the analysis that the court used to address both the federal and the state claims was quite similar. Compare *ibid.* with *id.* at 10a-12a. And that is no surprise, since the State argued to the Alabama Supreme Court that, "in equal protection challenges to tax statutes, the analysis under the state constitution is co-extensive with the analysis under the federal equal protection clause." Appellants' Br. 21 n.11. Because the State concedes that the "beyond a reasonable doubt" standard was used to decide the state constitutional challenge, it accordingly is apparent that the same standard was applied in the resolution of the federal claim.

Respectfully submitted.

RICHARD A. BALL, JR.
FRED B. MATTHEWS
Ball, Ball, Matthews & Novak, P.A.
Post Office Box 2148
Montgomery, AL 36102
(334) 387-7680

KENNETH S. GELLER
Counsel of Record
CHARLES A. ROTHFELD
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

SEPTEMBER 1999